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Application No.: 09/902,048

Inventor(s): Michael Lee Vatter

Filed: July 10, 2001

Docket No.: 8163L

Confirmation No.: 7755

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1) Amended Appeal Brief to comply with Notice of Non-Compliant Appeal Brief dated January 11, 2007 - 10 pages

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## IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Application No. : 09/902,048  
Inventor : Michael Lee Vatter  
Filed : July 10, 2001  
Art Unit : 1617  
Examiner : Shengjun Wang  
Docket No. : 8163L  
Confirmation No. : 7755  
Customer No. : 27752  
Title : Transfer-Resistant Makeup Removing Compositions

APPEAL BRIEF

Mail Stop Appeal Brief - Patents  
Commissioner for Patents  
P. O. Box 1450  
Alexandria, VA 22313-1450

This amended Appeal Brief is submitted in response to the Notification of Non-Compliant Appeal Brief dated January 11, 2007 and in support of the Notice of Appeal originally filed via facsimile on February 17, 2006. Timely response to the Notification is provided up to and including February 11, 2007.

The Notification indicated that the amended Appeal Brief filed July 24, 2006 was defective for failing to contain the items required under 37 CFR §41.37(c)(1)(v) and 37 CFR §41.37(c)(1)(vii). Accordingly, Appellants have amended the Appeal Brief to comply with 37 CFR §41.37. Please consider the following Appeal Brief.

REAL PARTY IN INTEREST

The real party of interest is The Procter & Gamble Company of Cincinnati, Ohio.

RELATED APPEALS AND INTERFERENCES

There are no known related appeals, interferences, or judicial proceedings.

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### STATUS OF CLAIMS

Claims 1-6 and 8-12 stand rejected and are pending in the present application. Claim 7 has been cancelled. Claims 1-6 and 8-12 are appealed. A complete copy of the appealed claims is set forth in the Claims Appendix attached herein.

### STATUS OF AMENDMENTS

No amendment was filed.

### SUMMARY OF CLAIMED SUBJECT MATTER

The first independent claim 1 relates to a method for removing transfer resistant make-up compositions comprising the step of applying a safe and effective amount of a make-up removing composition comprising: from 0.1 to 30% of a crosslinked siloxane elastomer, preferably having a particle size of from above 10 to about 200 microns (page 3, line 30 through page 8, line 16, and specifically page 7, lines 20-22 of the specification); from 10 to 80% of a solvent having a solubility parameter of less than or equal to about 9 (cal./cm<sup>3</sup>)<sup>1/2</sup> (page 8, line 18 through page 9, line 2 of the specification); and from about 0% to about 95% water (page 10, lines 5-8 of the specification and original claim 1). Preferably, the make-up contains at least about 10% by weight of a silicone gum and/or resin (page 3, lines 21-25 of the specification).

The second independent claim 12 relates to a cosmetic removing wipe, comprising one or more layers of water-insoluble substrate; and a safe and effective amount of a make-up removing composition comprising; (i) from about 0.1 to about 30% of a non-spherical crosslinked siloxane elastomer said elastomer having a particle size of from above 10 to about 200 microns; (page 3, line 30 through page 8, line 16, and specifically page 7, lines 20-22 of the specification) (ii) from about 10 to about 80% of a solvent suitable for topical application to the skin having a solubility parameter of less than or equal to about 9 (cal./cm<sup>3</sup>)<sup>1/2</sup>; (page 8, line 18 through page 9, line 2 of the specification) (iii) from about 0% to about 90% water; (page 10, lines 5-8 of the specification and original claim 1) and (iv) an emulsifier; (page 17, lines 17-33 of the specification) wherein the composition has a viscosity greater than about 20,000 cps (page 7, lines 9 – 13 of the specification).

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GROUND OF REJECTION TO BE REVIEWED ON APPEAL

Rejection of claims 1-6 and 8-12 under 35 USC §103(a) over Schulz (U.S. patent 5,654,362) in view of Dreschler (U.S. patent 6,071,503) in further view of Fowler (U.S. patent 5,534,265).

ARGUMENTS

- I. Claims 16 and 8-12 are patentable because there is no suggestion or motivation to modify or combine the references.

Appellants respectfully traverse the above rejection because there is no motivation to combine the references, as required in MPEP 2143.01. Second, the combined references do not teach or suggest all of the claim limitations, as required in MPEP 2143.03. Thus, the obviousness rejection given by the Examiner does not establish a *prima facie* case of obviousness. Therefore, Appellants contend that the claimed invention is unobvious and that the rejection should be withdrawn.

There is no motivation to combine Schulz with Dreschler. The Examiner states that it would have been obvious to one of ordinary skill in the art to employ the elastomer disclosed by Schulz for removing transition resistant cosmetics. Appellants respectfully disagree. Schulz teaches siloxane gels made by reacting a  $\equiv\text{Si-H}$  containing polysiloxane with an alpha, omega-diene. Dreschler teaches a cosmetic composition applied to the lips comprising the combination of organosiloxane resins and fluid diorganosiloxane resins with a volatile carrier.

The Examiner states that one of ordinary skill in the art would have been motivated to incorporate further amounts of cyclodimethicone with the elastomer solid described in Schulz, if necessary for the removal of transfer resistant cosmetics. Appellants respectfully disagree. The Schulz reference is primarily directed to deodorant compositions. Column 2, lines 20-21 of Schulz states that the materials are ideal for use in solid cosmetics such as antiperspirants and deodorants. The Schulz reference only mentions the use of its silicone elastomer as a color cosmetic remover in a laundry list of potential uses. Most of the specification and the examples are directed to antiperspirant and deodorant compositions. One skilled in the art would not look to Schulz's teachings

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of solid antiperspirant and deodorant compositions to create a transfer resistant make-up removing composition.

One skilled in the art would have no motivation to combine Schulz's teachings of siloxane gels in an antiperspirant or deodorant composition with Dreschler's teaching of a cosmetic composition applied to the lips comprising organosiloxane resins and fluid diorganosiloxane resins. Therefore, Appellants contend that a *prima facie* case of obviousness has not been established, and the claimed invention is not obvious in view of the cited references.

II. Claims 16 and 8-12 are patentable because the combined references do not teach or suggest all of the claim limitations.

Appellants further respectfully traverse the above rejection because the Examiner does not establish a *prima facie* case since the combined references fail to teach an element of the claimed invention. Specifically, Schulz, Dreschler, and Fowler do not teach or suggest a method for removing transfer resistant make-up compositions comprising the step of applying a safe and effective amount of a make-up removing composition comprising from about 0.1 to about 30% of a *non-spherical* crosslinked siloxane elastomer having a particle size of from about 10 to about 20 microns; from about 10 to about 80% of a solvent suitable for application to the skin having a *solubility parameter of less than or equal to about 9 (cal./cm<sup>3</sup>)<sup>1/2</sup>*; optionally, water; and an emulsifier, wherein the composition has a *viscosity greater than about 20,000 cps.* (emphasis added). None of the prior references teach or suggest a non-spherical crosslinked siloxane elastomer in combination with a solvent having a specific solubility parameter, wherein the composition has a specific viscosity.

The Examiner states that the optimal amounts of a cosmetic ingredient (i.e., the elastomer) or the viscosity of a cosmetic composition is considered within the skill of the artisan. Appellants respectfully disagree. Factors including the amount of elastomer present, the particle size of the elastomer, the amount of solvent present, the solubility parameter of the solvent, and the viscosity of the composition are all directly related to the composition's ability to act as a transfer resistant make-up removing composition. As stated above, Schulz is directly related to a solid deodorant or antiperspirant composition.

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Thus, one skilled in the art would not optimize a deodorant or antiperspirant composition in developing a transfer resistant make-up composition.

The Examiner also states that using non-spherical particles would have been obvious. Appellants respectfully disagree. As described on page 8, lines 10-18 of the specification, the non-spherical crosslinked siloxane elastomers of the present invention are thought to provide preferred rheology and film properties in order to achieve the benefits of the present invention. Specifically, when forming the gel matrix or network, non-spherical particles swell and/or pack more tightly than spherical particles. There is no hint in the prior references that signifies consideration that non-spherical crosslinked siloxane elastomers of the present invention provide such benefits.

None of the prior references teach or suggest a method for removing transfer resistant make-up compositions comprising the step of applying a composition comprising a non-spherical crosslinked siloxane elastomer of a specific particle size in the amount claimed in the present invention in combination with a solvent having a specific solubility parameter, wherein the composition has a specific viscosity. Therefore, Appellants contend that a *prima facie* case of obviousness has not been established, and the claimed invention is not obvious in view of the cited references.

#### SUMMARY

In view of all of the above, it is respectfully submitted that the aforementioned rejection is erroneous. The Board's reversal of the rejection is respectfully requested.

Respectfully submitted,

THE PROCTER & GAMBLE COMPANY



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Date: February 2, 2007  
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CLAIMS APPENDIX

1. (Rejected) A method for removing transfer resistant make-up compositions comprising the step of applying a safe and effective amount of a make-up removing composition comprising:
  - (i) from about 0.1 to about 30% of a non-spherical\_crosslinked siloxane elastomer said elastomer having a particle size of from above 10 to about 200 microns;
  - (ii) from about 10 to about 80% of a solvent suitable for topical application to the skin having a solubility parameter of less than or equal to about 9 (cal./cm<sup>3</sup>)<sup>1/2</sup>;
  - (iii) optionally, from about 0% to about 90% water and;
  - (iv) an emulsifier;wherein the composition has a viscosity greater than about 20,000 cps.
2. (Rejected) The method of Claim 1 wherein the transfer resistant make-up is silicone gum or resin based.
3. (Rejected) The method of Claim 2 wherein the make-up removing composition further comprises a skin conditioning agent.
4. (Rejected) The method of Claim 1 wherein the skin conditioning agent is selected from the group consisting of humectants, exfoliants, emollients and mixtures thereof.
5. (Rejected) The method of Claim 4 wherein the skin conditioning agent is a humectant.
6. (Rejected) The method of Claim 5 wherein the humectant is selected from the group consisting of propylene glycol, dipropylene glycol, polypropylene glycol, polyethylene glycol, sorbitol, hydroxypropyl sorbitol, hexylene glycol, glycerin,

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1,3-butylene glycol, 1,2,6-hexanetriol, ethoxylated glyccrin, propoxylated glyccrin and mixtures thereof.

7. (Cancelled)
8. (Rejected) The method of Claim 1 wherein the emulsifier is polyoxyalkylene copolymer.
9. (Rejected) The method of Claim 8 wherein the polyoxyalkylene copolymer is dimethicone copolyol.
10. (Rejected) The method of Claim 1 wherein the crosslinked siloxane elastomer is a mixture of non-emulsifying and emulsifying crosslinked siloxane elastomers.
11. (Rejected) The method of Claim 1 wherein makeup removing compositions further comprises an active selected from the group consisting of peptides, palmitoyl-oligopeptide, farnesol, bisabolol, phytantriol, glycerol, urea, guanidine, ascorbic acid, vitamin A, vitamin E, vitamin B<sub>3</sub>, vitamin B<sub>5</sub>, sunscreens, anti-acne medicaments; antioxidants, flavonoids, skin soothing and healing agents, chelators, sequestrants, opacifiers and mixtures thereof.
12. (Rejected) A cosmetic removing wipe, comprising:
  - A. one or more layers of water-insoluble substrate; and
  - B. a safe and effective amount of a make-up removing composition comprising:
    - (i) from about 0.1 to about 30% of a non-spherical crosslinked siloxane elastomer said elastomer having a particle size of from above 10 to about 200 microns;
    - (ii) from about 10 to about 80% of a solvent suitable for topical application to the skin having a solubility parameter of less than or equal to about  $9 \text{ (cal./cm}^3)^{1/2}$ ;
    - (iii) optionally, from about 0% to about 90% water;
    - (iv) an emulsifier;



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wherein the composition has a viscosity greater than about 20,000 cps.

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## EVIDENCE APPENDIX

None.

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RELATED PROCEEDINGS APPENDIX

None.

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